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Alan J. Farber

*Catholic University of America*

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## Special Comment

# The Handicapped Plead for Entrance—Will Anyone Answer?

BY ALAN J. FARBER\*

### INTRODUCTION

In a routine entitled "The Pep Talk,"<sup>1</sup> comedian Bill Cosby tells a story about his days as a fullback at Temple University. The day of the big game was at hand and the coach was unusually eloquent, inspiring the team to theretofore unattained heights of adrenalin-charged readiness. One more "Are we gonna win?" followed by the frenzied response, and on to the field. Wrong. The locker room door was locked.

It is little short of astounding that in this, the bicentennial year of the United States and the age of once unimaginable technology, the door remains locked, locked physically, to many millions of our citizens.<sup>2</sup> Architecture is supposedly

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\* Assistant Professor of Law, Catholic University of America School of Law; B.S.L., J.D., University of Louisville; LL.M., University of Chicago Law School. The author expresses his gratitude to Richard A. Yarmey, J.D., Catholic University of America School of Law, 1975, for his aid in the preparation of this article.

<sup>1</sup> Warner Brothers Records, *Bill Cosby is a Very Funny Fellow. Right!* (W.S. 1518).

<sup>2</sup> This article is primarily concerned with the failure of the federal government to provide adequate access to federal facilities to nonambulatory disabled individuals. As the reader will discover, the government has also been insufficiently responsive to the needs of those ambulatory persons who suffer from auditory or visual disabilities. While the author has not placed his emphasis on the needs of this latter group, he does not intend to suggest that their needs are any less urgent than those of our nonambulatory citizens.

The total number of physically handicapped individuals in the United States is not readily ascertainable. The number has recently been placed at approximately 12 million. See *Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 265 (1972) [hereinafter cited as *Handicapped Hearings—Senate*]. One expert has suggested that by 1980 for every able-bodied person there will be a physically disabled, chronically ill, or over-65 person. This prediction does not take into account the temporarily disabled. President's Committee on Employment of the Handicapped, *Removing Barriers from the Pathways of the Handicapped*, HUMAN NEEDS (February 1973). One of the problems in obtaining accurate and meaningful statistics in this area is the result

man's attempt to tame his environment and render it functional, yet architectural barriers confront the physically disabled at their places of residence, at recreational and entertainment facilities and, not least, at places of potential employment.

It is equally bewildering that inaccessibility remains so great a problem despite the apolitical nature of the issue and the technical ease of its resolution. Physical disabilities transcend sex, race, creed, and economic status. Architectural remedies consist of such simple measures as installing ramps rather than steps and placing elevator buttons and water fountains a bit lower on walls, neither of which is beyond the ken of our architects and engineers. Indeed, the only true barrier to the solution of accessibility problems seems to be governmental inertia.

### I. CONGRESSIONAL RESPONSE TO THE ACCESS PROBLEM

Some of the states have undertaken relatively credible programs to eliminate structural barriers.<sup>3</sup> Unless and until each state becomes a "model state," however, handicapped persons in interstate travel will continue to find themselves at the mercy of regional idiosyncracies.<sup>4</sup> The access problems con-

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of the inability of statisticians to measure the effect of a defined handicap on the ability of the handicapped to function normally in society. For example, an individual with a spinal cord injury may be able to obtain employment but incapable of utilizing public transportation or gaining access to the facility in which he is to work due to architectural barriers. *Handicapped Hearings—Senate* 1006. See generally U.S. SOCIAL SECURITY ADMIN., DEP'T OF HEALTH, EDUC. & WELFARE, SOCIAL SECURITY SURVEY OF THE DISABLED: 1966 (Rpt. No. 10, 1970); U. S. DEP'T OF HEALTH, EDUC. & WELFARE, CHRONIC CONDITIONS AND LIMITATIONS OF ACTIVITY AND MOBILITY (National Health Survey Series 10, No. 61) (1971).

<sup>3</sup> One state that has done an outstanding job in revamping its laws is North Carolina. Its *Illustrated Handbook of the Handicapped* section of the *North Carolina State Building Code* is over 100 pages in length and covers a wide range of public and residential buildings. See N. C. GEN. STAT. § 143-136 *et seq.* (1974); See also MICH. COMP. LAWS ANN. § 125.1351 *et seq.* (Supp. 1975); KY. REV. STAT. §§ 227.200-227.305 (Supp. 1974). Kentucky has attracted national attention by providing over 40 state restroom facilities which are wheelchair accessible. The facilities are located along the state's highway system and are designated by display of the International Symbol of Access. Further facilities are planned. AMERICAN AUTOMOBILE ASS'N LOUISVILLE AUTOMOBILE CLUB, AUTOMOBILE BULLETIN 5 (June-July 1975).

<sup>4</sup> See THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, A SURVEY OF STATE LAWS TO REMOVE BARRIERS (1973). In response to the problem of state-to-state

fronting the handicapped could be remedied by a major federal response, but legislation on the issue has been both scant and narrow. Congress did address the problem, in however limited a fashion, when it enacted the Architectural Barriers Act of 1968.<sup>5</sup> The Act provides that any public building to be con-

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variances in accessibility regulations, students working under Professors Raymond Marcin and Alan Farber have completed a draft "Uniform Barrier Free Design Act." This draft Act is presently being redrafted by Professors Marcin and Farber at the request of the President's Committee. A Uniform Act by definition compels enactment (and exposure to amendment) 51 times over, with the very real risk that the state-to-state variances sought to be avoided might remain. Not since the Uniform Commercial Code was adopted with few amendments in 49 states has a Uniform Act been met with near-unanimous approval.

<sup>5</sup> 42 U.S.C. §§ 4151-56 (1970). The Act, as amended, provides as follows:

**§ 4151. Definitions.**

As used in this chapter, the term "building" means any building or facility (other than (A) a privately owned residential structure and (B) any building or facility on a military installation designed and constructed primarily for use by able bodied military personnel) the intended use for which either will require that such building or facility be accessible to the public, or may result in the employment or residence therein of physically handicapped persons, which building or facility is—

- (1) to be constructed or altered by or on behalf of the United States;
- (2) to be leased in whole or in part by the United States after August 12, 1968, after construction or alteration in accordance with plans and specifications of the United States;
- (3) to be financed in whole or in part by a grant or a loan made by the United States after August 12, 1968, if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan; or
- (4) to be constructed under authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or title III of the Washington Metropolitan Area Transit Regulation Compact.

**§ 4152. Standards for design, construction, and alteration of buildings; Secretary of Health, Education, and Welfare.**

The Administrator of General Services in consultation with the Secretary of Health, Education, and Welfare, is authorized to prescribe such standards for the design, construction, and alteration of buildings (other than residential structures subject to this chapter and buildings, structures, and facilities of the Department of Defense subject to this chapter) as may be necessary to insure that physically handicapped persons will have ready access to, and use of, such buildings.

**§ 4153. Same; Secretary of Housing and Urban Development.**

The Secretary of Housing and Urban Development, in consultation with the Secretary of Health, Education, and Welfare, is authorized to prescribe

structed, leased, altered or financed by or on behalf of the United States subsequent to the date of enactment must meet standards of accessibility which an administrator is "authorized to prescribe."<sup>6</sup> Unfortunately the Act falls far short of what might have been accomplished. In passing the "hot potato" to the executive without adequately articulating even minimum standards, Congress has licensed the administrator to further dilute the Act's token prescriptions.

Although the definitional provisions of the Act are reasonably comprehensive with respect to federal structures,<sup>7</sup> and might have provided the basis for a program with broad and meaningful impact, the enabling clauses leave much to be de-

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such standards for the design, construction, and alteration of buildings which are residential structures subject to this chapter as may be necessary to insure that physically handicapped persons will have ready access to, and use of, such buildings.

**§ 4154. Same; Secretary of Defense.**

The Secretary of Defense, in consultation with the Secretary of Health, Education, and Welfare, is authorized to prescribe such standards for the design, construction, and alteration of buildings, structures, and facilities of the Department of Defense subject to this chapter as may be necessary to insure that physically handicapped persons will have ready access to, and use of, such buildings.

**§ 4155. Effective date of standards.**

Every building designed, constructed, or altered after the effective date of a standard issued under this chapter which is applicable to such building, shall be designed, constructed, or altered in accordance with such standard.

**§ 4156. Waiver and modification of standards.**

The Administrator of General Services, with respect to standards issued under section 4152 of this title, and the Secretary of Housing and Urban Development, with respect to standards issued under section 4153 of this title, and the Secretary of Defense with respect to standards issued under section 4154 of this title, is authorized—

- (1) to modify or waive any such standard, on a case-by-case basis, upon application made by the head of the department, agency, or instrumentality of the United States concerned, and upon a determination by the Administrator or Secretary, as the case may be, that such modification or waiver is clearly necessary, and
- (2) to conduct such surveys and investigations as he deems necessary to insure compliance with such standards.

<sup>6</sup> 42 U.S.C. § 4152 (1970).

<sup>7</sup> The provisions are reasonably comprehensive notwithstanding an overly broad exclusion for "any building on a military installation designed and constructed primarily for use by able bodied military personnel." 42 U.S.C. § 4151 (1970). If strictly construed, this exception is unabashedly circular. By noncompliance, there is compliance.

sired. The Administrator of General Services<sup>8</sup> is simply authorized to prescribe such standards of accessibility as may be necessary. Neither minimum standards (e.g., "at least one entrance must be accessible by ramp") nor a full compliance deadline<sup>9</sup> are set by the statute. Further, the Administrator is given untrammelled discretion to modify or waive any standard he might prescribe merely upon application by the head of an agency, if such waiver "is clearly necessary."<sup>10</sup> No other standards or limitations on the Administrator's discretion are fixed by the statute.<sup>11</sup>

Only in the legislative history can one find grounds for an argument that Congress intended a more aggressive program

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<sup>8</sup> So also, in a more limited way, are the Secretaries of Defense and Housing and Urban Development with respect to structures uniquely under their jurisdictions.

<sup>9</sup> This shortcoming is of considerable importance since, as will be seen, under the Administrator's standards compliance of existing structures may be deferred indefinitely.

<sup>10</sup> 42 U.S.C. § 4156(1) (1970).

<sup>11</sup> With respect to the extent to which the Congress may delegate away untrammelled discretion, Professor Davis argues quite convincingly that, from a constitutional law standpoint, the nondelegation doctrine is dead. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 201 *et seq.* (3d ed. 1972). Only two intimately related Supreme Court cases stand for the proposition that broad congressional delegations of so-called legislative power are unconstitutional. *Ryan v. Panama Ref. Co.*, 293 U.S. 388 (1935); *United States v. Schechter Poultry Corp.*, 295 U.S. 495 (1935). Later cases retreated to the principle that such delegations were constitutionally permissible so long as guiding or limiting "standards" were prescribed; however, there is no denying that the standards which have consistently withstood judicial scrutiny have been so vague as to make this limitation meaningless. See, e.g., *American Trucking Ass'n, Inc. v. United States*, 344 U.S. 298 (1953) ("all necessary orders"); *American Power and Light Co. v. SEC*, 329 U.S. 90 (1946) ("unfairly or inequitably"); *Federal Radio Comm'n v. Nelson Bros. Bond and Mortgage Co.*, 289 U.S. 266 (1933) ("public convenience, interest, or necessity"). Indeed, there is support for the notion that even such superficial standards are unnecessary in order for a legislative delegation to be permissible. See DAVIS, *supra* at § 203.

The purpose of raising the issue of lack of standards, therefore, is not to suggest that the Barriers Act is voidable under the nondelegation doctrine. Such a suggestion would be supported neither in the case law nor in the policy underlying the doctrine—to shield private interests by way of some intelligible standard from the arbitrary use of administrative authority. Nonetheless, in the context of the Barriers Act where the private interest to be protected is an affirmative interest of the handicapped in aggressive implementation rather than an interest in thwarting administrative authority run amuck, the nondelegation cases are noteworthy, for they teach by implication that delegation of unguided authority necessarily gives rise to some concern as to the manner in which a broad legislative license will be used or misused and whether or not there exist any procedural safeguards which may offset the breadth of discretionary power.

than appears on the face of the statute. In the *Report of the Senate Public Works Committee on S. 222* [hereinafter *Committee Report*],<sup>12</sup> the General Statement concludes:

The Congress should take action to pass legislation which would not only prevent the construction of public buildings by or on behalf of the Federal Government that are inaccessible to the physically handicapped, but would also set an example and guide to encourage State governments and private industry to construct buildings which will be used by the public in such a way that they are readily accessible to all people.<sup>13</sup>

The Committee's notion that its bill might serve as a model for the states may have been a bit grandiose, but at least the mandatory intent of the legislation is made clear. Indeed, the *Committee Report* is not only more strongly stated than the Act itself, but is also more potent to the point of inconsistency.

Section 6 of the Act includes a general waiver authority which allows the Administrator:

(1) to modify or waive any such standards, on a case-by-case basis, upon application made by the head of the department . . . and upon a determination by the Administrator . . . *that such modification or waiver is clearly necessary* . . . .<sup>14</sup>

The *Committee Report*, on the other hand, in reference to the same section, states:

The Committee also wants it clearly understood that section 4 of this bill is not intended to be used as a loophole for indiscriminate modifications or waivers of the regulations but is intended to apply to those relatively few special purpose buildings which may not require access to the physically handicapped.<sup>15</sup>

Clearly, these passages would lead to inconsistent results were they of equal authority. The language of the Act indicates that there may be a waiver of the standards where such waiver is

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<sup>12</sup> S. REP. NO. 538, 90th Cong., 2d Sess. (1967).

<sup>13</sup> U.S. CODE CONG. & AD. NEWS, 90th Cong., 2d Sess., at 3216 (1968).

<sup>14</sup> 42 U.S.C. § 4156 (1970) (emphasis added).

<sup>15</sup> U.S. CODE CONG. & AD. NEWS, 90th Cong., 2d Sess., at 3217 (1968).

“clearly necessary,” irrespective of the purpose of the building and whether or not it is to be used by the general public. In contrast, the Committee’s statement, if reflected in the language of the Act, would preclude waiver of any standard unless standards were simply unnecessary by virtue of a limited, non-public use of the building.

There do not appear to be any cases in which the language of § 6 of the Act has been construed, and it is somewhat unlikely that such a case will arise. It is incumbent upon the Congress, therefore, to clarify its intentions with regard to the proper administration of the waiver clause.<sup>16</sup> The importance of clarifying amendments is underscored by the questionable manner in which the Act has been implemented.

## II. ADMINISTRATION OF THE ARCHITECTURAL BARRIERS ACT

Anyone in sympathy with the purpose of the Act and responsive to its spirit would have an extraordinary opportunity, wholly consistent with the terms of the Act, to engage in a progressive and meaningful program to “access-ize” federal buildings, including those which predate the Act, within a relatively short span of time. Under the statute, the term “building” has a reasonably broad definition<sup>17</sup> which, if coupled with (1) strict limits on the applicability of the waiver authority<sup>18</sup> and (2) comprehensive and effective standards,<sup>19</sup> would constitute a significant program.

In contrast to the possibilities which the Act presents for rapid and widespread rectification of accessibility problems, the Administrator has not only failed to limit the applicability of the statute’s waiver clause but also incorporated an across-the-board waiver into the regulations.<sup>20</sup> According to § 101-19.604(b) of the regulations:

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<sup>16</sup> One opportunity to do so was by-passed when the 1968 Act was amended in 1970 to provide for accessibility to Washington’s newly authorized subway system. Act of March 5, 1970, Pub. L. No. 91-205, 84 Stat. 49.

<sup>17</sup> See 42 U.S.C. § 4151, *supra* note 5.

<sup>18</sup> See, e.g., the language of the Senate Public Works Committee, in text accompanying note 13 *supra*.

<sup>19</sup> No standards anticipated by the Act have been prescribed; rather, a set of standards antedating the Act by several years and obviously not drafted to fulfill the Act’s mandates have been incorporated into the regulations by reference.

<sup>20</sup> 41 C.F.R. § 101-19.604 (1974).



The standards established in § 101-19.603 shall not apply to:

. . . .

(b) The alteration of an existing building if the alteration does not involve the installation of, or work on, existing stairs, doors, elevators, toilets, entrances, drinking fountains, floors, telephone locations, curbs, parking areas, or other facilities susceptible of installation or improvements to accommodate the physically handicapped.<sup>21</sup>

This provision comes into direct collision with the terms of the Act. Whereas the statute itself is clear that *any* building or facility (other than private residences and certain military structures) to be constructed or altered by or on behalf of the United States is subject to standards of accessibility,<sup>22</sup> the Administrator's regulation requires application of the standards only to a building or facility to be constructed or altered in certain limited respects. The Administrator is saying that unless a facility is to be altered specifically for accessibility purposes, there is no need to be concerned about the standards. A serious question arises, therefore, as to whether the regulation conforms to the statutory mandate.<sup>23</sup>

An additional difficulty with this regulation is that the structures enumerated are only the most obvious of those structures which have an impact upon accessibility. Under the phrase "other facilities susceptible of installation or improvements to accommodate the physically handicapped,"<sup>24</sup> the determination of what such "other facilities" might be is apparently subdelegated to the agency heads. In this connection, it must be emphasized that the Act relates to both accessibility *and use*.<sup>25</sup> Section 101-19.604 of the regulations does not exempt from application of the standards alterations affecting furni-

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<sup>21</sup> 41 C.F.R. § 101-19.604(b) (1974).

<sup>22</sup> 42 U.S.C. § 4151 (1) (1970).

<sup>23</sup> The regulations include this summary waiver, whereas, under the statute, waiver is authorized only after application has been made by the head of an agency and only then after the "clearly necessary" determination has been made.

<sup>24</sup> 41 C.F.R. § 101-19.604(b) (1974).

<sup>25</sup> The Administrator is directed to prescribe standards which will "insure that physically handicapped persons will have ready access to, *and use of*, such buildings" 42 U.S.C. § 4152 (1970) (emphasis added).

ture design and office size, alterations of emergency alarm systems (which should be both audible and visible), alterations of wall coverings (upon which directions and room identifications might be put in relief or in braille) and so forth. One wonders, then, whether an agency head might consider such alterations as coming within the category of "other facilities susceptible of installation or improvement to accomodate the physically handicapped."

There are still other subsections of this regulation that give rise to further potential dilution of the Act. Under § 101-19.604(c) of the regulations, the standards of accessibility shall not apply to "[t]he alteration of an existing building, or of such portions thereof, to which application of the standards is not structurally possible."<sup>26</sup> Upon review of the standards incorporated into the regulations, it is difficult to conceive of a circumstance where this subsection would come into play, *i.e.*, where application of the standards would be *structurally* impossible. The construction of an elevator in a multiple-story building of historical significance, such as George Washington's Mount Vernon mansion, would seem to be structurally possible, though arguably undesirable from a policy standpoint. Accordingly, such a proposal would come within the ambit of the general waiver within the regulations<sup>27</sup> or, more properly, within the authority of the Administrator to grant waivers when "clearly necessary."<sup>28</sup> Thus, § 101-19.604(c) would seem to be superfluous.

However, the superfluity of this subsection might be a hazard as well as a weakness. Should the head of an agency determine, on whatever grounds, that certain modifications required to meet the standards are not structurally possible, the requirement of subsection (c) would appear to have been met and no review of this waiver would be required. From the few statistics that are available, it appears that agency heads have either fully complied with the standards, ignored them altogether, or utilized to the fullest the automatic waiver options provided by the regulations. The author's inquiries to the

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<sup>26</sup> 41 C.F.R. § 101-19.604(c)(1974).

<sup>27</sup> 41 C.F.R. § 101-19.604(b)(1974).

<sup>28</sup> 42 U.S.C. § 4156 (1970).

General Services Administration have revealed that only three waivers have been requested under § 4156(1) of the Act, and all three were granted.

Assuming that applicability of the standards is neither waived by the Administrator nor excepted *sua sponte* by an agency head under subsections (b) or (c) of § 101-19.604 of the regulations, the standards prescribed by the Administrator must be applied. The Administrator has not developed standards specifically for the purpose of implementing the Act, but rather has adopted by reference standards which predate the Act. The standards so adopted are those first developed in 1961<sup>29</sup> by the American National Standards Institute [hereinafter ANSI].<sup>30</sup>

### III. USE OF THE ANSI STANDARDS

It is admitted that the ANSI Standards are both (1) the standards most applauded by groups representing the interests of the handicapped as the best available standards of accessibility, and (2) the generally recognized standards for this purpose in the architectural and building construction trades.<sup>31</sup> Nonetheless, there are at least two factors which detract from the desirability of employing the ANSI Standards as regulations under the Architectural Barriers Act.

The ANSI Standards clearly were not written to fully implement a specific act of Congress.<sup>32</sup> They are, in the words of the Institute, "intended to present minimum requirements."<sup>33</sup> Even the Administrator has recognized that these are "mini-

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<sup>29</sup> AMERICAN STANDARDS ASSOCIATION, INC., AMERICAN NATIONAL STANDARD SPECIFICATIONS FOR MAKING BUILDINGS AND FACILITIES ACCESSIBLE TO, AND USABLE BY, THE PHYSICALLY HANDICAPPED, Number A117.1-1961 (Reaffirmed 1971) [hereinafter ANSI Standards].

<sup>30</sup> Formerly the American Standards Association.

<sup>31</sup> The standards were developed by ANSI at the request of the President's Committee on the Employment of the Handicapped. A number of organizations representing the handicapped were represented on the drafting committee.

<sup>32</sup> It is conceded that the Institute states that the Standards "are recommended . . . for adoption and enforcement by administrative authorities." ANSI Standards, *supra* note 29, at 3. However, the foregoing is presumed to have meant adoption in substance, not in fact. As will be shown below, adoption verbatim for mandatory enforcement would be legally naive.

<sup>33</sup> ANSI Standards, *supra* note 29, at 3.

num standards.”<sup>34</sup> As a consequence, the standards, though extremely beneficial from the viewpoint of guiding private interests in the construction of accessible facilities, are not as comprehensive and aggressive as might be anticipated under a federal program designed “to insure that physically handicapped persons will have ready access to, and use of, such buildings.”<sup>35</sup>

For example, the ANSI Standards prescribe minimum openings for doorways, and doors which “shall be operable by a single effort.”<sup>36</sup> It is then noted that “automatic doors that otherwise conform [to the Standards] are very satisfactory.”<sup>37</sup> Clearly, it would be within the province of the Administrator to explicitly prescribe that one external door be automatic, or at least that manual doors be operable by an exertion of “X” pounds of pull and be equipped with closers that delay the closing swing for a reasonable number of seconds during which a wheelchair could safely pass.<sup>38</sup>

With respect to the “*and use of*”<sup>39</sup> language of the Act, the

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<sup>34</sup> 41 C.F.R. § 101-19.603 (1974).

<sup>35</sup> 42 U.S.C. § 4152 (1970).

<sup>36</sup> ANSI Standards, *supra* note 29, at 5.3.1.

<sup>37</sup> ANSI Standards, *supra* note 29, at 5.3.3. n.2.

<sup>38</sup> The GSA has not been insensitive to the general problems pointed out in this article. GSA architectural trainees are made aware of the problems of the handicapped. A recently published GSA study of this training highlights the deficiencies herein noted by the author. Architectural trainees spent a day in a wheelchair in federal buildings throughout the country. Their experiences are set out in GENERAL SERVICES ADMINISTRATION PUBLIC BUILDINGS SERVICE, DAY ON WHEELS, (January 1975) [hereinafter cited as WHEELS].

One trainee notes that “[r]eview of our material disclosed to us that certain fundamental truths are not being borne in mind by designers when designing for the handicapped. Even though standard minimum requirements are being followed to the letter, facilities still do not function properly.” WHEELS at 93. Another trainee states: “I had only to travel several feet to the entrance of the building before I encountered my first barrier. The wheelchair could not be used in the revolving door, and only with great effort on my part was I able to use the single swing door . . . .” WHEELS at 18. Still another trainee reports: “A door operated by a door closing device is a formidable obstacle. When a person in a wheelchair pushes the door open, there is the opposite and equal reaction that tends to move the chair backwards. Frustratingly, by the time the chair is moved forward again, the door has frequently closed.” WHEELS at 42. “Wheelchair toilet stalls are being provided at specified dimensions but still not permitting closure of the door behind the wheelchair; towel dispensers are being placed at minimum height but still out of reach from a sitting position over a counter; flush and sloped curbs and thresholds are being provided for wheelchairs without textural warning for the blind or tread for the aged.” WHEELS at 93-95.

<sup>39</sup> See 42 U.S.C. § 4152 *et seq.*, *supra* note 5.

ANSI Standards do not and cannot be expected to address several architectural considerations of great significance to handicapped federal employees, or potential employees. Thus, the ANSI Standards do not fix specifications for desk or file designs, nor are there specifications for intra-office pathways or wheelchair-high counter space in credit unions or cafeterias.<sup>40</sup> From the viewpoint of the handicapped public (*i.e.*, nonemployees), the Standards do not address such features as maximum display window heights in museums, and the like.<sup>41</sup> In sum, the Administrator, in implementing the Act, could have gone well beyond the minimum standards developed by ANSI in more fully effectuating barrier-free use of federal structures.<sup>42</sup>

Beyond the practical and technical shortcomings of the adoption of the ANSI Standards for this regulatory purpose, however, are some troublesome legal issues. The regulations state that "every building designed, constructed, or altered after September 2, 1969, *shall be* designed, constructed or altered in accordance with the [ANSI Standards] . . . ."<sup>43</sup> This is obviously mandatory language, yet the standards which

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<sup>40</sup> Assuming the language of the Act should be read "and full use of."

<sup>41</sup> For example, the Department of Interior Aquarium is inaccessible.

<sup>42</sup> Many other examples might be cited, not least among which is the absence of a specification calling for the prominent display of the international symbol of accessibility near facilities which have met standards.

A recent study prepared by the Iowa Governor's Committee on Employment of the Handicapped in cooperation with the Iowa Chapters of the American Institute of Architects and Easter Seal Society is noteworthy. The survey points out in part that:

[i]n nearly 70% of the projects parking provisions were not made for the handicapped. . . . Nearly one-fourth of the stairs were built with abrupt nosings diagrammed as unacceptable in the standards. . . . [O]ver one-third of the buildings did not have accessible drinking fountains in accordance with the standards and the law. . . . At least half of the buildings surveyed had telephones available and accessible to disabled persons. However, most of these were desk phones in offices . . . . Coin operated public telephones were generally too high—the coin slot was too high and the cord too short. . . . [T]here was a general lack of understanding of the problems of the blind.

IOWA GOVERNOR'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, ACCESSIBILITY—THE LAW AND REALITY: A SURVEY TO TEST THE APPLICATION AND EFFECTIVENESS OF PUBLIC LAW 90-480 IN IOWA 9-12 (1974) [hereinafter cited as SURVEY]. The study concludes that "the Architectural Barriers Act of 1968 has not met the stated intent of Congress—to insure that certain buildings . . . are . . . accessible to the physically handicapped" as it pertains to Iowa." SURVEY at 15.

<sup>43</sup> 41 C.F.R. § 101-19.603 (1974) (emphasis added).

"shall be" followed are couched in loose, judgmental, indeed voluntary terms.

For instance, the Standards often prescribe that there be an "appropriate number" of certain accessible facilities.<sup>44</sup> In recognition of the difficulty in applying this term, the Standards define "appropriate number" as follows:

As used in this text, appropriate number means the number of a specific item that would be necessary, in accord with the purpose and function of a building or facility, to accomodate individuals with specific disabilities in proportion to the anticipated number of individuals with disabilities who would use a particular building or facility.<sup>45</sup>

Admittedly, this language provides adequate guidance to an architect designing a specific structure in an area where the demographics are easily ascertainable. Nevertheless, the language is utterly unacceptable for employment in a mandatory, regulatory scheme of broad applicability.

Additional examples abound. The ANSI Standards provide that "[s]ome mirrors and shelves" in lavatories should be placed at usable heights,<sup>46</sup> that "elevators are essential" in multiple-story buildings (though no number per capita is prescribed),<sup>47</sup> and that floors "shall have a surface that is nonslip" (though no coefficient of friction is specified).<sup>48</sup> The point is not that the ANSI Standards fail to accomplish that which they were ordained to accomplish, but rather that they were not drafted, and cannot properly be incorporated by reference, as regulations under a specific law comprehending a definite program for upgrading access to federal facilities.<sup>49</sup>

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<sup>44</sup> See, e.g., ANSI Standards, *supra* note 29, at 5.6 (toilet rooms), 5.7 (water fountains), 5.8 (public telephones).

<sup>45</sup> ANSI Standards, *supra* note 29, at 2.13.

<sup>46</sup> ANSI Standards, *supra* note 29, at 5.6.4.

<sup>47</sup> ANSI Standards, *supra* note 29, at 5.9.

<sup>48</sup> ANSI Standards, *supra* note 29, at 5.5.1.

<sup>49</sup> The writer is aware that the ANSI Standards are presently being rewritten in cooperation with Syracuse University. The results of that effort are distant and their impact with respect to the efficacy of the Standards as regulations under the 1968 Act are, at this writing, uncertain.

## CONCLUSION

The Architectural Barriers Act of 1968 does not effectively accomplish that which it protests to do. As a result of easily avoidable ambiguities in the statutory language and unsupervised administrative dilution even where the statute does seem clear and unequivocal on its face, the Act simply does not, in legal or practical effect, "insure that physically handicapped persons will have ready access to, and use of, [federal] buildings."<sup>50</sup> The Act functions, then, as an ineffectual policy statement rather than as a masterplan for a mandatory program. As the legislative history of the Act implies<sup>51</sup> and as any wheelchair-bound individual will attest, voluntarism in the area of accessibility, as in civil rights issues, is essentially nonexistent.

An important recent development in the area of architectural barrier law was the creation of an Architectural and Transportation Barriers Compliance Board by the 93d Congress.<sup>52</sup> The Board was formed as part of a comprehensive re-drafting of the federal rehabilitation laws.<sup>53</sup> The Board is charged with:

insur[ing] compliance with the standards prescribed by the General Services Administration . . . [and other agencies] pursuant to the Architectural Barriers Act of 1968 (Public Law 90-480), as amended by the Act of March 5, 1970 (Public Law 91-205) . . . .<sup>54</sup> [A]n order of compliance issued by the Board shall be a final order for purposes of judicial review.<sup>55</sup>

While it is too early to assess the Board's impact on the administration of the Architectural Barriers Act, the Board certainly has the potential to effect a major improvement in the Act's credibility. The Board has the mandate to insure compliance with standards issued by the GSA and other agencies. To the extent that there has been noncompliance with these standards in the past, a vigilant Board can readily advance the

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<sup>50</sup> 42 U.S.C. § 4152 (1970).

<sup>51</sup> See note 13 *supra*.

<sup>52</sup> 29 U.S.C. § 792 (Supp. III, 1973).

<sup>53</sup> 29 U.S.C. § 701 *et seq.* (Supp. III, 1973).

<sup>54</sup> 29 U.S.C. § 791(b) (Supp. III, 1973).

<sup>55</sup> 29 U.S.C. § 791(d) (Supp. III, 1973).

move toward full compliance. It is less clear whether the Board will use its persuasive force in mounting an assault on the inadequacies of the standards themselves. Such an attack is certainly necessary if the Board is to insure the type of full accessibility envisioned by this article.

It is conceded that in the past decade great strides have been taken toward rendering federal facilities accessible to a greater number of our citizens. The intent in developing this article has been to present constructive criticism of the content and administration of the Architectural Barriers Act. It is hoped that members of Congress and those individuals involved in the implementation of the Act will receive it in that context, and that the ideas here presented will be of benefit to them and their constituents.